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No. 73-759

In the Supreme Court of the United States

OCTOBER TERM, 1973

HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, *Et Al.*,

Appellants,

v.

MARSHA B. HEALY, *Et Al.*,

Appellees.

On Appeal From the United States District Court For the Eastern District of Louisiana

JURISDICTIONAL STATEMENT AND APPENDIX ON BEHALF OF APPELLANTS

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On Appeal From the United States District Court For the Eastern District of Louisiana

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Jurisdictional Statement

The opinion of the three-judge United States District Court for the Eastern District of Louisiana has not been reported. A copy of the opinion is attached hereto as Appendix A.

This suit was brought under the provisions of 28 U.S.C.A. §§2201, 2202, 2281, and 2284 to obtain declaratory and injunctive relief. The complaint sought to have Article 7, Section 41 of the Louisiana Constitution, Louisiana Revised Statutes 13:3055, and

Article 402 of Louisiana Code of Criminal Procedure, which provide an exemption of women from jury service, declared unconstitutional. The judgment of the Court below was entered on September 4, 1973. A copy of the judgment is attached hereto as Appendix B. The Court stayed the execution of its judgment on September 10, 1973. A copy of the stay is attached hereto as Appendix C. Appellants filed their notice of appeal on September 18, 1973, in the United States District Court for the Eastern District of Louisiana. A copy of the notice is attached hereto as Appendix D.

Jurisdiction

This Court has jurisdiction for this appeal pursuant to 28 U.S.C.A. §1253, which provides:

> Except as otherwise provided by law; any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Cases

The cases believed to sustain the Court's jurisdiction are:

(a) *Radio Corporation of America v. United States*, D.C. Ill., 95 F. Supp. 660, *aff'd*, 341 U.S. 412 (1950);

(b) *Anderson v. Martin*, 375 U.S. 399 (1964);

(c) *Palmetto Fire Insurance Company v. Connecticut*, 272 U.S. 295 (1926).

Constitutional and Statutorial Provisions

The three-judge court in the United States District Court, Eastern District of Louisiana, declared unconstitutional and enjoined the enforcement of Article 7, Section 41 of the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which are as follows:

(a) Article 7, Section 41 of the Constitution of Louisiana:

> The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

(b) LSA-R.S. 13:3055:

> A woman shall not be selected for jury ser-

vice unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

(c) Article 402 of the Louisiana Code of Criminal Procedure:

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

Questions Presented

1. Do the Louisiana constitutional and statutorial provisions that exempt women from service on juries unless they file a written declaration of their desire to serve deny all of the male and female citizens of Louisiana due process and equal protection as sanctioned in the 14th Amendment of the United States Constitution?

2. Do the female and male plaintiffs fairly and adequately represent the class they purport to represent?

3. What is the class the female and male plaintiffs purport to represent?

4. What is the class the female intervenors purport to represent?

5. Did the female and male plaintiffs have standing to sue?

6. Did the female intervenors have standing to sue?

7. Did the three-judge court abuse its discretion by overruling *Hoyt v. Florida*, 368 U.S. 57 (1961)?

Statement of the Case

This action was commenced in the United States District Court for the Eastern District of Louisiana. Appellees claimed to be litigating on their own behalfs and on behalf of others similiarly situated. Named as defendants were all of the appellants.

The complaint sought declaratory and injunctive relief before a three-judge court.

The three-judge court rendered its opinion on August 31, 1973, declaring Article 7, Section 41 of the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which provide an exemption of women from jury service, to be unconstitutional. Simultaneously the three-judge court overruled *Hoyt v. Florida*, 368 U.S. 57 (1961).

No testimony was adduced in the court below. The only reference to the alleged facts of the case is contained in the complaint.

Following the opinion and order of the court below, appellants filed a motion to stay execution. The stay was granted by order of the court dated September 10, 1973. Thereafter, appellants filed their notice of appeal.

Appellants consist of the original defendants. Appellees consist of all those originally designated as parties plaintiffs and intervenors.

The Questions are Substantial

This case is of great importance to the orderly administration of the jury service system in the State of Louisiana. The guiding hand of this Court is urgently needed to resolve a clear and direct conflict between state and federal courts operating in the same territory and having equal responsibility in passing on federal constitutional questions. Guidance is further needed to resolve a direct conflict between a lower federal court and this Court.

An anomalous situation now exists in Louisiana. In *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court upheld the constitutionality of a Florida statute almost identical to the Louisiana Constitution and statutes involved in the present case.

The Louisiana Supreme Court has followed the decision in *Hoyt*, *supra*, in numerous cases. *See State v. Enloe*, 276 So. 2d 283 (1973); *State v. J. C. Curry*, 262 La. 280, 263 So. 2d 36 (1972); *State v. Daniels*, 262 La. 475, 263 So. 2d 859 (1972); *State v. Reese*, 250 La. 151, 194 So. 2d 279, *cert. denied*, 389 U.S. 996 (1967); *State v. Comeaux*, 252 La. 481, 211 So. 2d 820 (1968); *State v. Pratt*, 255 La. 919, 233 So. 2d 891 (1970); *State v. Alexander*, 255 La. 941, 233 So. 2d 891 (1970); *State v. Sinclair*, 258 La. 84, 245 So. 2d 365 (1971); *State v. Millsap*, 258 La. 883, 248 So. 2d 324 (1971), and *State v. Amphy*, 259 La. 161, 249 So. 2d 560 (1971).

There has been no contrary jurisprudence from this Court since the *Hoyt* decision, although the Court has had the opportunity to overrule that case at least once in the past year. *See Alexander v. Louisiana*, 405 U.S. 625 (1972).

Appellants respectfully assert that this case presents an appropriate opportunity for this Court to articulate guidelines and standards to be followed in the future in order to avoid a repetition of the type of conflict here presented. That is one of the principal reasons that plenary review by this Court is now urgently sought.

Conclusion

We urge that the questions presented by this appeal are critical to the administration of the jury selection system in Louisiana and elsewhere and, further, that they are so substantial as to require plenary consideration by this Court. We ask that jurisdiction be noted.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
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s/ Warren E. Mouledoux
WARREN E. MOULEDOUX,
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CERTIFICATE

I HEREBY CERTIFY that copies of the foregoing Jurisdictional Statement and Appendix have been served upon Mr. George Strickler, Jr., 1110 Royal Street, New Orleans, Louisiana 70116, by depositing same in the United States Mail, postage prepaid, addressed as above, this 7th day of November, 1973.

I FURTHER CERTIFY that copies of the foregoing Jurisdictional Statement and Appendix have been served upon Ruth Bader Ginsburg, Columbia University, 435 W. 116th Street, New York, New York 10027, and Sylvia Roberts, P. O. Box 3081, Baton Rouge, Louisiana 70821, by depositing same in the United States Mail, postage prepaid, addressed as above, this 7th day of November, 1973.

S/Warren E. Mouledoux

WARREN E. MOULEDOUX,
First Assistant Attorney General
of Louisiana.

APPENDIX A

Opinion of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

v.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities,

Defendants.

CIVIL ACTION
NO. 73-688
SECTION "C"
(THREE-JUDGE COURT CASE)

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Ruth Bader Ginsburg, Atty.
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Attorneys for Defendants

RUBIN, District Judge:

The Louisiana Constitution[1] and statutes[2] exempt women from service on juries unless they file a written declaration of their desire to serve. This benign dispensation has resulted in jury panels that, in the parishes here involved, have never included more than five percent females, and frequently less. The plaintiffs in this class action seek a declaration that the exemption provisions violate the rights of the class to Equal Protection and Due Process of the Law, and an injunction against continued enforcement of these laws.

I.

Three separate classes of suitors join in the attack: (a) one comprises all females in the named parishes; these women contend that both their right to serve on juries and their opportunity, should occasion arise, to litigate before juries is abridged; (b) another comprises all males in those parishes; these men contend that they are subject to more onerous jury service

[1]La. Const. Art. VII, §41.
[2]Under the authority of the state constitutional provision, separate statutes allow the exemption in civil and in criminal cases: LSA-R.S. 13:3055; La. Code of Criminal Procedure, Art. 402.

because similarly situated females are not required to serve; and (c) the third, the intervening class, is composed of female litigants in civil cases in state court; these contend they are deprived of a jury of their peers.

Because the jurisdiction of federal courts is limited by the Constitution to "Cases" and "Controversies," Art. III, Sec. 2, U.S. Constitution, they may not issue merely advisory opinions concerning the constitutionality of legislation, federal or state. Indeed the power to declare a statute unconstitutional is deduced from the necessity of determining its validity in order to decide a particular case or controversy.

A case, in the constitutional sense, must present a real controversy. A statute may be attacked as unconstitutional only by someone who has sustained or is in immediate danger of sustaining some direct injury from its enforcement. It does not suffice to show that one is injured merely as a member of the body politic. Frothingham v. Mellon, 1923, 262 U.S. 447, 43 S.Ct. 597.

This is what is meant by standing to sue, the requirement that, to justify attack on legislation, a litigant be able to show injury by the statute, "for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of value interests of concerned bystanders." United States v. SCRAP, 1973, ___ U.S. ___, ___ S.Ct. (slip op. at p. 16).

In *SCRAP*, only a few weeks ago, the Supreme Court focused the light of the decisions on standing:

the test is whether the litigant can show "injury in fact," that he has been or will in fact be "perceptibly harmed." The litigants in *SCRAP* met that test by alleging a "specific and perceptible harm that distinguished them from other citizens."

It is not necessary that the harm be great or substantial; it suffices that it be small, indeed a trifle, so long as it distinguishes a person with a direct stake in the outcome of the litigation from a person with a mere interest in the problem. SCRAP, ___U.S. at___, ___ S.Ct. at ___, and note 14 (slip op. at p. 18).

We pretermit the question whether all females as a class suffer a specific and perceptible harm when required to write a letter in order to serve on juries or whether the greater burden of jury service imposed on males by the virtual exemption of females from jury duty is a palpable enough trifle. Together these two classes—all women and all men—comprise the entire adult citizenry, and they allege in effect a harm to the body politic. It may be questioned whether, if the entire citizenry is aggrieved by official action, they may seek judicial relief instead of following the political route accorded by the democratic process.

But there is a class of persons joined in prosecuting this suit who have both a direct and a personal interest: the intervenors representing women who have suits pending in state court.

Litigants have standing to allege the unconstitutionality of a statute or practice that potentially denies their right to Due Process of Law by interfering with

fair jury selection.[3] The intervenors' standing to sue gives justiciability to the entire case. "[A] court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor." Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323, 328-329. Accord: Atkins v. State Board of Education, 4 Cir. 1969, 418 F.2d 874, 876; Hackner v. Guaranty Trust Co., 2 Cir. 1941, 117 F.2d 95, 98.

The intervenors represent, through Ms. Baggett, females actually engaged in litigation in state courts. To deprive them of a jury comprising a fair cross section of the population, including females, is a claim of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Golden v. Zwickler, 1969, 394 U.S. 103, 89 S. Ct. 956, 959. "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection." Carter v. Jury Commission, 1970, 396 U.S. 320, 90 S.Ct. 518, 523.

It is unnecessary to probe whether these litigants would have standing to challenge the provisions of the Louisiana Code of Criminal Procedure for jury selection in criminal cases, were that issue presented alone. Their right to challenge the Louisiana constitutional provision having been established, the issue of the en-

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[3] "[A] plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." National Student Association v. Hershey, D.C. Cir. 1969, 412 F.2d 1103, 1110.

tire scope of jury selection in all kinds of cases appears to be inescapably involved.

II.

Only twelve years ago, in Hoyt v. Florida, 1961, 368 U.S. 57, 82 S.Ct. 159, the Supreme Court upheld the constitutionality of a Florida statute almost identical to the challenged provisions of the Louisiana Constitution. That decision was followed in Leighton v. Goodman, S.D.N.Y. 1970, 311 F.Supp. 1181, and United States v. Caci, 2d Cir. 1968, 401 F.2d 664. *Hoyt* rested on the finding that Florida's statute was based on a reasonable classification and the venerable dictum in Strauder v. West Virginia, 1879, 100 U.S. 303, 310, unchallenged for eighty years, that a State may constitutionally confine jury duty "to males."

But the ground on which *Strauder* stood was eroded by Reed v. Reed, 1971, 404 U.S. 71, 92 S.Ct. 251, and crevassed by Frontiero v. Richardson, 1973, ___U.S.___, 93 S.Ct. 1764. In *Reed* the court held that an Idaho statute violated the Equal Protection Clause in providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. By according different treatment to applicants on the basis of their sex, the statute "establishes a classification subject to scrutiny under the Equal Protection Clause." *Reed, supra*, 92 S. Ct. at 253.

"The Equal Protection Clause . . . [denies] to States the power to legislate that different treatment

be accorded to persons placed by a statute into different classes on the *basis of criteria wholly unrelated to the objective of that statute.*" (Emphasis supplied.) Id. at 253-54. By ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are thus similarly situated." Id. at 254.

While only four justices were willing in *Frontiero* to conclude that classifications based upon sex "are inherently suspect," seven justices agreed that it was unconstitutional for Congress, solely for administrative convenience, to deny a female member of the uniformed services the right to claim her spouse as a dependent for the purposes of obtaining increased quarters allowances and medical and dental benefits without proving his actual dependency, while according this right to males with respect to female dependency. Three concurring justices found that *Reed* "abundantly supports our decision today." ___U.S. at ___, 93 S.Ct. at 1773.

The minimum requirement of Equal Protection, then is that dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated *with respect to the objectives of the legislation.* The objective of the state legislation here attacked is the method of selecting juries. The state does not contend that there is any difference between males and females with respect to their qualifications or competency as jurors. Nor could it do so, for women's full competency is demonstrated by their complete acceptability if they volunteer. Hence the state

constitutional provision patently fails to meet the requirements of Equal Protection for women as potential jurors. Female litigants having standing to sue can properly raise this issue which applies to women as a class.

Female litigants are also denied Equal Protection by being compelled to have their cases decided by juries composed entirely or predominantly of males. If this were proper sauce for geese, there might be gander gravy too: states might with equal logic grant jury exemptions only to all male wage earners who do not ask to serve, with the result that litigants, male and female, would be compelled in practice to submit to verdicts by predominantly female juries. Males might then properly question whether they were being afforded Equal Protection of the laws.[4]

[4]Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261, a federal criminal case tried in California, where no women were included on the panel of grand and petit jurors, is not directly applicable. But the court found the "purposeful and systematic exclusion" of women invalid, and observed:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet [it] is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.
>
> To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." 329 U.S. at 193, 67 S.Ct. at 264.

The Nineteenth Amendment brought women the right to vote, and freed them from strictures that had 43 years earlier been lifted from those males who had formerly been denied the franchise because of race. In the half century since then, women have moved in increasing numbers from hearthside into the world of work and business and politics. Forty percent of the American work force is female.[5] Over 57% of all American women between the ages of 20 and 24, and 45% of those between 25 and 34, are in the wage earning work force.[6]

Louisiana's continued subscription to the notion that women must be shielded from jury duty, unless they choose to volunteer, results in juries that are predominantly male. Whether favorable or unfavorable to females, the sexual prejudice implicit in the thesis that women are entitled to an exemption not accorded men imparts to the jury a potential prejudice, be it ever so subtle or intangible, that is real and meaningful. Compare Justice Murphy's dissenting opinion in Fay v. N.Y., 1947, 332 U.S. 261, 300, 67 S.Ct. 1613, 1633.

[5]See Lexcen, The Equal Rights Amendment, 31 Federal Bar Journal 247, 250-51; U.S. Dept. of Labor, Women's Bureau, *Underutilization of Women Workers*, 1971 (revised), p. 1.

[6]U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1972. Table No. 341, at p. 217.

III.

Litigants, male or female, have a constitutional right to trial by an impartial jury drawn from a cross section of the community. The "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 220, 66 S.Ct. 984, 985. Since this is inherent in Due Process of Law, the denial may be challenged not only by a litigant who is a member of a class excluded from representation,[7] but even by one whose right to an impartially selected jury is biased by disproportionate partiality to a class that includes him. Peters v. Kiff, 1972, ___ U.S. ___, 92 S.Ct. 2163.

Peters held that a white defendant might challenge discrimination against black jurors. The opinion illuminates that the arbitrary exclusion of any well-defined class of citizens offends a number of related constitutional values:

— the members of the class excluded are denied Equal protection:

— potential jurors are denied the "privilege of participating equally . . . in the administration of justice;" and

[7]Whitus v. Georgia, 1967, 385 U.S. 545, 87 S.Ct. 643; Avery v. Georgia, 1953, 345 U.S. 559, 73 S.Ct. 891; Norris v. Alabama, 1935, 294 U.S. 587, 55 S.Ct. 579; Carter v. Texas, 1900, 177 U.S. 442; Strauder v. West Virginia, 1879, 100 U.S. 303 (black defendants challenging discrimination against black jurors).

— "it stigmatizes the whole class, [of those excluded] even those who do not wish to participate, by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority;' "

— "exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community." Id. at 2167.

The court concluded:

But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.

* * * * *

Moreover, we are unwilling to make the assumption that the exclusion of Negroes has a relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. Id. at 2169.

Females, as individuals, bring to juries "qualities

of human nature and varieties of human experience," entirely different from those of males, and a diversity of temperament, among themselves, completely heterogeneous. Their absence from jury panels is significant not because all women react alike, but because they contribute a distinctive medley of views influenced by differences in biology, cultural impact and life experience, indispensable if the jury is to comprise a cross-section of the community.

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," the Supreme Court declared in Smith v. Texas, 1941, 311 U.S. 128, 130, 61 S.Ct. 164, 165, referring to the exclusion of jurors based on race. In like tenor, referring to the exclusion of wage earners, in Thiel v. Southern Pacific Company, 1946, 328 U.S. 217, 223, 66 S.Ct. 987, the Court commented that the excluded class "constitute[s] a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system."

A jury panel that is almost entirely male, whether because females are excluded or because they serve only if they volunteer and almost none step forward, cannot be "truly representative of the community," and women's absence does "violence to the democratic nature of the jury system." The jury must not merely mirror the American male, just as it must not reflect the views of only one race or one stratum of society.

Due Process insists upon the integrity of the jury system. There may be no constitutional requirement that a state proceed by grand jury indictment, Hurtado v. California, 1884, 110 U.S. 516, 4 S.Ct. 111. But when prosecution is initiated by indictment, the state may not impose a discriminatory pattern in selecting the jury. Hill v. Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159.

Similarly, it is unnecessary to search the limits of the Constitution for a right to jury trial in civil cases. "Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring that the selection of membership is free from racial bias," Carter v. Jury Commission of Green County, 1970, 396 U.S. 320, 330, 90 S.Ct. 518, 523-24, and, we add, every other type of unconstitutional discrimination.[8]

IV.

Nor must this court await the day when the Su-

[8]The Supreme Court has considered the requirements of the Constitution with respect to the manner of selecting juries in a number of cases. It would be mere pedantary to review them all. But the landmarks stand high and clear.

In Glasser v. United States, 1942, 315 U.S. 60, 85-86, 62 S.Ct. 457, 471-472, Justice Murphy wrote, with respect to the selection of federal juries:

> "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial. When the original Constitution provided only that 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;' the people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.
>
> • • • • •

preme Court itself has occasion to reconsider and overrule *Hoyt*.

But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' " Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84.

In that case the federal jury commissioner had included only those women whose names were on a list supplied by the Illinois League of Women Voters, and prepared exclusively from its membership. The court found this to be unconstitutional. The officials charged with choosing federal jurors,

"must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." Ibid.

See Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261 (women systematically excluded from grand jury); Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 66 S.Ct. 984 (all persons who worked for daily wage intentionally excluded from jury lists); Labat v. Bennett, 5 Cir. 1966, 365 F.2d 698 (wage earners systematically excluded from jury); State v. Madison, 1965, 240 Md. 265, 213 A.2d 880 (non-theists excluded from jury); Simmons v. State, Fla. 1966, 182 So.2d 442 (common laborers systematically excluded.)

Compare Fay v. People of the State of New York, 1947, 332 U.S. 261, 67 S.Ct. 1613, where the court rejected a challenge to state jury selection methods that resulted in blue ribbon juries as not violative of equal protection or due process, distinguishing the cases involving exclusion based on race as based on violation of federal legislation, 8 U.S.C.A. §44, designed to enforce the Fourteenth Amendment.

"This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case." Rowe v. Peyton, 4 Cir. 1967, 383 F.2d 709, 714, affirmed 391 U.S. 54.

This also was the view of the Second Circuit, in Perkins v. Endicott Johnson Corp., 2 Cir. 1942, 128 F.2d 208, where Judge Frank pointed out that, for lower courts to continue to hold stubbornly to barren precedent would stultify them and unnecessarily burden the Supreme Court. See also In re Korman, 7 Cir. 1971, 449 F.2d 32, reversed by the Supreme Court because the Seventh Circuit incorrectly concluded that earlier doctrine had been discarded, 92 S.Ct. 2055; Browder v. Gayle, M.D. Ala. 1956, 142 F.Supp. 707, affirmed 352 U.S. 903, and cases cited therein; contra Ward v. Luttrell, E.D. La. 1968, 292 F.Supp. 162; Fishkin v. United States Civil Service Commission, N.D. Calif., 1969, 309 F.Supp. 40, appeal dismissed, 1970, 396 U.S. 278, 90 S.Ct. 557; see Comment (1941) 50 Yale Law Journal 1448, 1450.

When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding.

V.

Because the Louisiana Constitution denies all litigants Due Process of Law and deprives female litigants of their right to Equal Protection by according an exemption from jury service to women on a basis different from that available to men under substantially similar circumstances, and on the basis of a sexual criterion that is wholly unrelated to the objectives of jury service, we declare it and the statutes enacted pursuant to it unconstitutional.

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

New Orleans, Louisiana
August 31, 1973.

MINUTE ENTRY
SEPTEMBER 7, 1973
RUBIN, J.

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

V.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZ-

MORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities,

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CIVIL ACTION
No. 73-688
SECTION "C"

* * *

In the opinion dated August 31, 1973, on page 5, paragraph 3, line 3, "seven" should be "eight".

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

APPENDIX B

Copy of Judgment of 3-Judge United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

v.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities,

---

CIVIL ACTION
No. 73-688
SECTION "C"

JUDGMENT

This matter came on for hearing on a previous day, and for the written reasons on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards,

Governor of La., Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Court, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional.

Dated at New Orleans, Louisiana, this 31st day of August, 1973.

BENJAMIN W. REISCH, Clerk
/s/ NELSON B. JONES,
Chief Deputy Clerk

APPROVED AS TO FORM:

/s/ ALVIN B. RUBIN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

v.

HON. EDWIN EDWARDS, Governor of La., HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL,

A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM; all defendants are sued both in their official and individual capacities

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CIVIL ACTION
NO. 73-688
SECTION "C"

AMENDED JUDGMENT

The Judgment of August 31, 1973 is amended to read as follows:

"This matter came on for hearing on a previous day, and for the written reasons on file herein,

"IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Marsha B. Healy, Suzanne D. Hill, Carolyn Hall, Linda Walz, Charles W. Hill, Jerry A. Walz and John J. Healy, and against defendants, Hon. Edwin Edwards, Governor of Louisiana, Hon. Thomas W. Tanner, Hon. Wallace A. Edwards, Hon. Hillary J. Crain, of the 22nd Judicial District Court, Delos Fussell, A. B. Crow, Billy W. Weaver, Robert Fitzmorris and Victor Grantham, declaring the Louisiana Jury Selection System whereby women may not serve on juries without filing a written declaration of their desire to do so unconstitutional and defendants are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional."

Dated at New Orleans, Louisiana, this 7th day of September, 1973.

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

APPENDIX C

Stay of Execution of Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

v.

HON. EDWIN EDWARDS, Governor of Louisiana, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities,

Defendants.

CIVIL ACTION
NO. 73-688
SECTION "C"
(THREE-JUDGE COURT CASE)

MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

Defendants, through the Honorable William J. Guste, Jr. move this court pursuant to Rule 62(C) of the Federal Rules of Civil Procedure to order a stay of the execution of judgment rendered in this action on August 31, 1973, pending said defendants' appeal from said judgment to the Supreme Court of the United

States; and, as grounds for said motion, the defendants say:

1. That the defendants will suffer irreparable injury in the loss of time of its officers, agents, and employees and expenses to be incurred by the defendants in compiling respective lists of all the eligible women in Louisiana for jury service as ordered by the Court's said judgment, in the event that said judgment is reversed upon the defendants' said appeal therefrom;

2. That the defendants will suffer irreparable injuries in complying with the injunction decreed by the Court's final judgment, in the event said judgment is reversed on the defendant's said appeal therefrom.

WHEREFORE, defendants pray that this Court order a stay of the execution of its judgment rendered in this action on August 31, 1973, pending defendant's appeal to the Supreme Court of the United States.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General

/s/ WARREN E. MOULEDOUX
First Assistant Atty. General

/s/ ROBERT L. DANNER, JR.
Special Counsel
2-3-4 Loyola Bldg.—7th Floor
234 Loyola Avenue
New Orleans, Louisiana 70112
527-8375

Filed: Sept. 10, 1973
U.S. District Court
Eastern District of Louisiana
Benjamin W. Reisch
Clerk

ORDER

The defendants having moved for a stay of execution of, or any proceedings to enforce, the judgment entered in the above entitled cause pending the defendants' appeal to the Supreme Court of the United States.

IT IS ORDERED that execution of, or any proceedings to enforce, said judgment be and the same is hereby stayed until the defendants' appeal to the Supreme Court is disposed of.

/s/ JOHN MINOR WISDOM
United States Circuit Judge

/s/ ALVIN B. RUBIN
United States District Judge

/s/ R. BLAKE WEST
United States District Judge

APPENDIX D

Notice of Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARSHA B. HEALY, SUZANNE D. HILL, CAROLYN HALL, LINDA WALZ, CHARLES W. HILL, JERRY A. WALZ and JOHN J. HEALY,

Plaintiffs,

v.

HON. EDWIN EDWARDS, Governor of Louisiana, HON. THOMAS W. TANNER, HON. WALLACE A. EDWARDS, HON. HILLARY J. CRAIN, Judges of the 22nd Judicial District Court, DELOS FUSSELL, A. B. CROW, BILLY W. WEAVER, ROBERT FITZMORRIS, VICTOR GRANTHAM: all defendants are sued both in their official and individual capacities,

Defendants.

CIVIL ACTION
No. 73-688
SECTION "C"
(THREE-JUDGE COURT CASE)

NOTICE OF APPEAL

Defendants, Honorable Edwin Edwards, Governor of Louisiana, et al., through the Honorable William J. Guste, Jr., pursuant to 28 U.S.C.A. §1253, hereby give notice of their appeal to the Supreme Court

of the United States from the Court's judgment entered on September 4, 1973.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General

/s/ WARREN E. MOULEDOUX
First Assistant Attorney General

Filed: Sept. 18, 1973
U.S. District Court
Eastern District of Louisiana
Benjamin W. Reisch
Clerk

B-4380, 11-73